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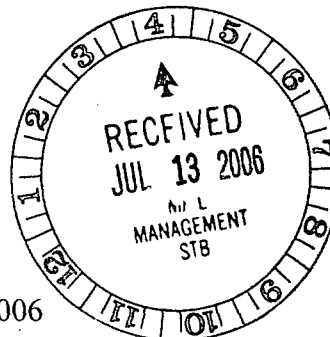
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July 13, 2006

BY HAND DELIVERY

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Secretary
Surface Transportation Board
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Seventh Floor
Washington, D.C. 20423

ENTERED
Office of Proceedings

JUL 13 2006

Part of
Public Record

**Re: STB Finance Docket No. 34797
New England Transrail, LLC – Petition for Exemption**

Dear Secretary Williams:

Enclosed please find an original and 10 copies of the Supplemental Comments of the New Jersey Department of Environmental Protection and the New Jersey Meadowlands Commission, in the above referenced proceeding. Please date stamp and return one copy to our messenger for our records.

If you have any questions concerning this, please to not hesitate to contact me.

Very truly yours,

Edward D. Greenberg

Enclosure

cc: All Parties



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JUL 13 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

Part of
Public Record

FINANCE DOCKET NO. 34797

NEW ENGLAND TRANSRAIL, LLC
D/B/A WILMINGTON & WOBURN TERMINAL RAILWAY
PETITION FOR EXEMPTION



SUPPLEMENTAL COMMENTS OF
THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND THE NEW JERSEY MEADOWLANDS COMMISSION

On January 27, 2006, the New Jersey Department of Environmental Protection ("NJDEP") and the New Jersey Meadowlands Commission ("NJMC") submitted their Comments in response to a Petition for Exemption filed in this matter by New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway ("NET"). After reviewing those and other submissions, the Board served a decision on June 13, 2006 seeking additional comments concerning whether the activities proposed to be conducted by NET come within the Board's jurisdiction. These Supplemental Comments are in response to the Board's June 13, 2006 Decision.

In their initial comments, NJDEP and NJMC specifically explained, *inter alia*, why the solid waste processing activities conducted at solid waste transfer stations located adjacent to rail lines do not constitute rail "transportation" as that term is defined at 49 U.S.C. § 10102(9), and are accordingly neither subject to the Board's jurisdiction nor immune from federal, state or local environmental and safety regulation. (See NJDEP/NJMC Comments at 7-15, and the Verified Statement of John Castner, Director of the Division of County Environmental and Waste Enforcement of NJDEP.) As the June 13 Decision stated that it was not necessary for parties to duplicate arguments that

have already been submitted, NJDEP and NJMC will not repeat all of the points they previously raised.

NJDEP and NJMC respectfully request, however, that the Board pay specific attention to the matters contained in the Castner Statement submitted with their previously-filed comments. NJDEP and NJMC specifically directs the Board's attention to Mr. Castner's discussion of the unique nature of the solid waste industry: (1) how the compacting, shredding, baling, sorting, segregating and recycling of solid waste - - all of which are collectively referred to as "processing" - - are core activities that are provided by solid waste transfer stations and, (2) why state and local oversight of processing is an essential step in protecting the environment and the health and safety of the citizens. In addition, Mr. Castner points out that many solid waste transfer stations located near railroad tracks, claiming to be immunized from state regulatory controls due to the preemption provision in 49 U.S.C. § 10501(b)¹, have been operated much like open dumps.

In determining whether the processing activities proposed by NET (as well as those described by Mr. Castner) properly fall within the definition of rail "transportation," the Board should recognize that such solid waste processing activities require the oversight of state or local environmental authorities that have the staff, resources and specific mission to oversee such activities, regardless of how and by whom they are conducted. It is evident that facilities that operate as an open dump or otherwise process solid waste, pose a serious contamination threat to ground water, nearby streams and wetlands, as well as the surrounding air through the release of dust and particulates.

¹ The argument by such operators that state and local regulation is preempted under section 10501(b) due to their asserted status as rail "transload," rather than solid waste "transfer", stations is in any event incorrect; *see* NJDEP/NJMC Comments at 15-26.

Experience in New Jersey has also revealed these facilities as fire hazards due to the large quantities and types of combustible debris they process.² This debris is frequently subjected to high pressure and heat conditions depending on the size of a waste pile at a given facility, and several fires occurred at rail transfer stations in the State in recent years. Finally, regular oversight is necessary to ensure that conditions at these facilities don't pose health and safety risks to the employees who work at them.

Except to the extent the solid waste may ultimately be loaded into rail cars, waste processing activities have nothing to do with the provision of railroad transportation services and are unrelated to the Board's economic regulatory responsibilities. Moreover, significant resources are required to oversee the activities of the large number of such facilities that are in operation. Accordingly, state and local oversight of solid waste processing would not only be advantageous from a resource perspective but essential to the public health and safety.

Facilities that merely load or unload automobiles, lumber, sugar or other commodities that are not likely to adversely affect the environment are more akin to classic and legitimate rail transportation.³ Those activities do not require the technical environmental oversight that states and local communities are able to provide. Similarly, any incidental aggregation or comparable handling of such goods does not necessarily entail a need for state or local regulation or impinge upon their status as legitimate

² For example, Exhibit 1 is a copy of a news story published by the Passaic Herald News relating to a recent fire that took place at a solid waste transfer station operated on the property of the New York & Greenwood Railway Co.

³ Of course, in the event that activities at one of these facilities does threaten the environment or the health and safety of citizens, the states would be able to initiate necessary remedial actions pursuant to their police powers and obligations to enforce Federal environmental statutes. STB Finance Docket No. 33971, *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA* (decision served May 1, 2001; not published) at 9.

railroad transload facilities, but that is not true with respect to the solid waste disposal industry. In each of the above examples, the truck delivering the commodity to the railroad for shipment knows what is in the truck and takes responsibility for it. This is not the case with solid waste, where the trucks, loader, shipper and the railroad frequently have limited knowledge of the contents of a truck before the materials are dumped at a facility.

In New Jersey, persons and entities engaged in the immensely profitable solid waste disposal business have increasingly attempted to characterize their activities as rail transportation in attempts to obtain the perceived benefits of the preemption provision of section 10501(b). When challenged by state regulatory authorities, these facilities typically are able to continue operations during the course of protracted litigation, reap the financial benefits until enjoined, and then move on to their next venture. That was clearly the course of action pursued by Hi Tech Trans, LLC. As the Board is aware, the *Hi Tech* litigation involved the attempt by a sham railroad to hold off state environmental oversight of a solid waste transfer facility that was a patent threat to the environment and the health and safety of nearby citizens. Hi-Tech kept its operation going for a number of years through multiple actions before the Board, federal district courts, the Third Circuit Court of Appeals and the NJDEP administrative process as it contested state and county attempts to enforce compliance with various environmental and flow control regulations. Now, two of Hi Tech's principals have moved on and are currently active in the NET putative railroad operation. (Castner Statement at ¶ 16.)

Regrettably, the *Hi Tech* experience is not an isolated occurrence, and the courts are becoming jammed with similar instances where solid waste operators attempt to

abuse the section 10501(b) preemption provision in pursuit of windfall profits. The prominent role played by these waste operators further underscores that activities at the waste transfer stations are solid waste management, not rail transportation. After the final scene in *Hi Tech* was played out with the Third Circuit's decision in *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) ("*Hi Tech III*"), other solid waste disposal companies restructured their arrangements in an attempt to avoid the *Hi Tech* decision by contending that they were acting as loading agents for railroads, and that their solid waste processing activities are immunized rail "transportation." While NJDEP and NJMC contend that these arrangements, even if conducted by a legitimate railroad, do not impede their authority and responsibility to enforce the Clean Air Act, the Clean Water Act and the applicable state environmental and health and safety regulations, the specter of section 10501(b) has made that enforcement far more difficult.

For example, a number of solid waste disposal companies located in Hudson County, New Jersey, entered into a series of intricate arrangements with the New York, Susquehanna and Western Railway ("NYSW") – arrangements that made it appear that those companies were only acting as agents of the railroad and that it was the railroad that controlled all activities at the various facilities. After the State commenced action against these facilities, two were shut down and the litigation⁴ is now in its second year with no end in sight despite significant discovery, briefs and arguments. And while there has been some improvement in the remaining "NYSW" facilities since the presiding judge first saw them, the photographs appended to the Castner Statement bear stark witness to the need for State oversight.

⁴ *New York, Susquehanna and Western Railway v. Lisa P. Jackson*, Civil Action No. 05-0410.

In a similar case, U.S. District Court Judge Simandle found after extensive discovery that the attempt by a solid waste entrepreneur to pass off its activities as the loading agent of a railroad operation was a sham. *J.P. Rail, Inc. v. New Jersey Pinelands Com'n*, 404 F. Supp.2d 636 at 651-52 (D.N.J. 2005) (“*JP Rail I*”). As is evident from Judge Simandle’s opinion, the role played by the railroad was very limited, since the driving force behind that operation was the solid waste operator, engaged in the extraordinarily lucrative business of processing and disposing of solid waste. In an attempt to distinguish their activities from those that were found to be non-railroad activities in STB Finance Docket No. 34192, *Hi-Tech Trans, LLC – Petition for Declaratory Order – Newark, New Jersey* (decision served August 14, 2003; not published)(“*Hi-Tech II*”), the owner of the site (and his lawyer) engaged in several paper transactions that were intended to make it appear that the railroad was actually controlling the operations. Citing the Third Circuit’s decision in *Hi-Tech III*, however, Judge Simandle found that the mere fact that railcars were ultimately used to transport the waste “does not morph [the railroad’s putative loading agent’s] activities into ‘transportation by railcarrier.’” 404 F. Supp.2d at 651. The court accordingly granted the preliminary injunction sought by the NJDEP and the Pinelands Commission and enjoined the defendants and the railroad from any further site preparation or other activities at that location in furtherance of a plan to move solid waste without complying with federal and state law.

Almost immediately after the issuance of this decision, those same parties, together with their lawyer and J.P. Rail, commenced construction and operation of another solid waste transfer business at a different location, again making no effort to

comply with NJDEP's regulations pertaining to solid waste transfer stations. Once again, the State of New Jersey, acting on behalf of NJDEP, was compelled to seek to enjoin these unauthorized activities, and filed a complaint in Federal district court alleging that the defendants' activities violated both the Solid Waste Management Act, as well as the State's implementation of the federal Coastal Zone Management Act through the Coastal Area Facilities Review Act. *State of New Jersey, New Jersey Department of Environmental Protection v. J.P. Rail, Inc.; SRNJ Logistics; and Magic Disposal Incorporated* (Civil Action No. 06-1603, D. NJ) The case was dismissed without prejudice when the issue of an alleged lack of subject matter jurisdiction was raised *sua sponte* by the judge. (Decision issued April 25, 2006.)⁵

NJDEP re-filed its action in the state court in *The State of New Jersey v. J.P. Rail, Inc., SRNJ Logistics and Magic Disposal, Inc.* (Docket No. ATL-C-41-06, Superior Court N.J., Chancery Division). On June 16, 2006, Judge William Todd concluded that it was unnecessary to determine whether the challenged activities were actually controlled by the railroad or the entities that were engaged in the solid waste business. Instead, he decided that there was sufficient evidence to permit a ruling on the threshold issue of whether the defendants' processing activities constituted "transportation" within the meaning of 49 U.S.C. §10102(9). Concluding that such activities were not rail transportation, Judge Todd stated:

The processing of solid waste is a sensitive, dramatic problem, classically subjected to regulation at the local level and it is difficult to imagine that Congress would have intended that either the regulation of those activities by the

⁵ See Exhibit 1, which is the decision of dismissal issued by Judge Irenas. Interestingly, Judge Irenas also observed that "[t]he Court cited on the record what it believed to be applicable authorities and stated its tentative conclusion that the ICCTA did not completely preempt any of the state environmental law claims asserted by NJ DEP...." (Decision, at ¶ 2.)

states would be preempted by the statute, or that it would, or that it intended to entrust the resolution of those regulatory problems to the Surface Transportation Board. I think there's some basic intellectual appeal to saying that can't be what they intended, it's counter-intuitive. It doesn't seem to fit with what one would think Congress was concerned about when it was trying to protect rail carriers from undue intrusion.⁶

As Judge Todd found that the processing of solid waste is not rail transportation, NJDEP's regulations could not be preempted by Section 10501(b) of the Act. He accordingly enjoined the defendants from processing solid waste, which term was defined as "including but not limited to the disposal, sorting, processing, grinding, crushing, aggregating, segregating and/or baling of solid waste prior to loading the waste into rail cars or containers for rail shipment."⁷

In doing so, Judge Todd cut directly to the substance of the issue without awaiting the result of extensive discovery to ascertain whether these were sham railroad activities or whether, if the facility was actually controlled and operated by a railroad through a legitimate agency relationship with a loading agent, any federal or state environmental regulations was preempted by section 10501(b). In his view, the processing activities he proscribed are those services that are provided by solid waste disposal businesses prior to delivery of cargo to railroads for loading. Hence, it makes no difference whether those services are actually performed by the solid waste business or some entity purporting to act as the agent of a railroad. In either event, the services are not rail "transportation"

⁶ See Exhibit 2, which is a rough transcript of the proceedings before Judge Todd on June 16, 2006 at page 23. As of the date of this filing, a final transcript was unavailable from the court.

⁷ See Exhibit 3, at 2 ("*JP Rail II*"). We are advised that JP Rail has submitted a motion with Judge Todd seeking leave to file an interlocutory appeal.

when performed and do not take on that character simply because they take place on rail owned or leased property and the waste is ultimately loaded on a rail car.⁸

As NJDEP pointed out in its initial comments in this proceeding, there is no analytical justification for including any activities in the pre-loading chain, other than loading itself, in the definition of transportation. If NET is correct that its processing activities are “transportation” services, then any activity at any point in the pre-loading chain - - from knocking down a building, to gathering waste, to trucking the waste to the transfer facility where the further processing takes place - - would have an equal claim that it should be jurisdictional under the ICCTA. But that theory has already been rejected by the Board and the courts. *Hi Tech I; Florida East Coast Ry. v. City of West Palm Beach*, 110 F. Supp.2d 1367 (D.S.D. FL 2000); *aff’d* 266 F.3d 1324 (11th Cir. 2001).

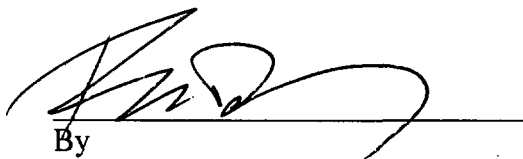
Accordingly, NJDEP and NJMC urge the Board to issue a clear statement that the processing of solid waste is not rail transportation within the meaning of section 10102(9), so that the industry, states and local communities can bring to an end the enormously burdensome, wasteful and expensive litigation that is engendered by parties trying to cloak their activities with virtual immunity from any meaningful environmental or health and safety regulation.

⁸ See, also, STB Finance Docket No. 34192, *Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ* (decision served November 20, 2002) (“*Hi Tech I*”), where the Board concluded that the inbound transportation of solid waste to a rail facility is not a service that is integrally related to rail transportation services. As the Board recognized,

under *Hi Tech*’s theory, all state and local regulations of activities that occur before a product is delivered to a rail carrier for transportation would be preempted. Preemption clearly does not go that far; nor does the Board’s jurisdiction.

Decision at 3.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'Ed Greenberg', written over a horizontal line.

By
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Special Counsel for the State of New Jersey
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Dated: July 13, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of July, 2006, served a copy of the foregoing Supplemental Comments of The New Jersey Department of Environmental Protection and The New Jersey Meadowlands Commission on the following persons listed below via first-class mail, postage pre-paid:

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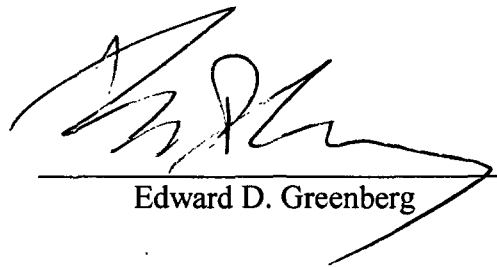
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Edward D. Greenberg

NorthJersey.com

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Fire scorches Passaic waste transfer site

Wednesday, April 5, 2006

By **ALEXANDER MacINNES**
HERALD NEWS

PASSAIC — A controversial waste-transfer rail station on Passaic Street, which stores on average of 320 tons of construction and demolition debris, caught fire Tuesday morning and still was not completely extinguished by early evening, fire officials said.

Two Passaic firefighters suffered minor injuries but refused medical care as fire crews cautiously extinguished the blaze from the perimeter of the property, rather than entering the corrugated metal building where the debris burned.

"The contents were unknown and it was too dangerous to make an attempt [to get inside]," said Deputy Fire Chief Jose A. Roman.

Fire Inspector John Miskovsky said he could not comment on the possible cause of the fire.

The transfer site began operating last May over objections by some city officials and residents. Because the site is a rail-based station, it needs local or state permits under the preemption clause in the 1995 Interstate Commerce Commission Termination Act.

Passaic land-use and zoning boards had no oversight on its operations and city officials cannot cite it for violations.

Jim Wilson, president of the New York & Greenwood Railway Co., which operates the transfer station, said the cause of the fire was undetermined, but there were 160 tons of mostly wood and plaster construction debris in two freight cars on site at the time of the fire.

He said no asbestos or chemicals "that we know of" were burned in the fire.

County health officials responded to the scene to conduct environmental air tests. They concluded that the burning trash was not a chemical danger to the public, according to Deborah Drake, an officer with the Passaic County Health Department.

Fred Mumford, a spokesman with the state Department of Environmental Protection that is responsible for inspecting the facility, said the DEP will investigate the fire.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE STATE OF NEW JERSEY, :
NEW JERSEY DEPARTMENT OF :
ENVIRONMENTAL PROTECTION, : HONORABLE JOSEPH E. IRENAS
: CIVIL ACTION NO. 06-1603 (JEI)
Plaintiff, :
:
v. : ORDER DISMISSING WITHOUT PREJUDICE
: THE COMPLAINT AND DISMISSING
J.P. RAIL, INC., d/b/a : ALL PENDING MOTIONS AS MOOT
SOUTHERN RAILROAD COMPANY:
OF NEW JERSEY; SRNJ :
LOGISTICS; and MAGIC :
DISPOSAL INCORPORATED, :
:
Defendants. :

APPEARANCES:

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Attorney for Defendant Magic Disposal, Inc.

IRENAS, Senior District Judge:

This matter having appeared before the Court upon the Motion
of Plaintiff New Jersey Department of Environmental Protection

("NJ DEP") for an Order to Show Cause why this Court should not issue a Temporary Restraining Order enjoining Defendants from continuing their development and operation of a solid waste transloading facility located in the City of Pleasantville, Atlantic County, New Jersey, the Court having considered the submissions of the parties and having heard oral argument on the record on April 19, 2006, and it appearing that:

1. As discussed at length at oral argument on the motion, this Court *sua sponte* raised the question whether we have federal question subject matter jurisdiction over this dispute between non-diverse parties.¹ The issue was whether the Interstate Commerce Commission Termination Act, 29 U.S.C. § 10501(b), ("ICCTA") completely preempts at least some portion of NJ DEP's claims such that this Court would have subject matter jurisdiction despite the fact that none of the three claims asserted "arise under" federal law in that the Complaint does not allege any violation of a federal statute.² See *Caterpillar Inc.*

¹ See 28 U.S.C. § 1331. "[Federal] Rule [of Civil Procedure] 12(h)(3) allows a District Court to dismiss an action for lack of subject-matter jurisdiction on its own motion." *DeSantis v. Franklin*, 160 Fed. Appx. 237, 238 n.1 (3d Cir. 2005).

² At oral argument the Court noted that the first count of the Complaint is entitled "Coastal Zone Management Act," ("CZMA") which is a federal statute, but that the Complaint does not actually allege a violation of the CZMA. Rather, NJ DEP alleges violations of New Jersey's CAFRA regulations that were merely enacted pursuant to the Coastal Zone Management Act. We further noted that, in any event, the CZMA does not give the State of New Jersey a private right of action against private parties. See *State of New Jersey Dept. of Env'tl Protection v. Long Island Power Auth.*, 30 F.3d 403, 421-23 (3d Cir. 1994) (explaining that the "CZMA provides for federal assistance in states' development of coastal zone management plans and coordinates federal activities with the state management program" but "does

v. Williams, 482 U.S. 386, 393 (1987) (complete preemption occurs when "the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987))).

2. The Court cited on the record what it believed to be applicable authorities and stated its tentative conclusion that the ICCTA did not completely preempt any of the state environmental law claims asserted by NJ DEP, therefore the Court lacked subject matter jurisdiction. However, because the parties had not briefed the issue, the Court reserved decision on the Order to Show Cause and allowed NJ DEP until April 24, 2006, to research the jurisdictional issue and advise the Court whether it wished to further pursue its claims in this Court or voluntarily withdraw the Complaint.

3. On April 24, 2006, counsel for NJ DEP advised the Court that it would not submit briefing on the jurisdictional issue and it wished to voluntarily withdraw the Complaint. That same day, counsel for Defendants J.P. Rail, Inc. and SRNJ Logistics called the Court to inquire as to the status of the case, at which time the Court informed counsel of NJ DEP's decision.

not confer federal rights that NJ DEP may assert against private individuals."). Counsel for NJ DEP did not dispute either point.

4. Accordingly, in light of NJ DEP's representation that it wishes to voluntarily withdraw the Complaint in this case, and for good cause shown,

It is on this 25th day of April, 2006,

ORDERED that:

1. The Complaint is **dismissed without prejudice.**
2. The Motion for an Order to Show Cause (Docket #11) and the Motion to Consolidate Cases (Docket #10) are **dismissed as moot.**
3. The Clerk is directed to close this file.
4. In the event that NJ DEP refiles this case in state court, and any Defendant seeks removal of the case, the removing Defendant(s) shall attach a copy of this Order to the notice of removal and the Clerk shall assign the case to this Judge in accordance with Local Civil Rule 40.1.

s/Joseph E. Irenas
JOSEPH E. IRENAS, S.U.S.D.J.

3

1 SUPERIOR COURT OF NEW JERSEY
2 CHANCERY DIVISION
3 ATLANTIC COUNTY
DOCKET NO. ATL-C-41-06

4 THE STATE OF NEW JERSEY, :
5 NEW JERSEY DEPARTMENT OF :
6 ENVIRONMENTAL PROTECTIONS: :
7 :
8 :
9 :
10 :
11 :

Plaintiff, :

-v- :

8 J.P. RAIL, INC., a :
9 Pennsylvania Corporation :
10 d/b/a SOUTHERN RAILROAD :
11 COMPANY OF N.J., SRNJ :
LOGISTICS and MAGIC :
DISPOSAL INC., :

Defendants. :

THIS TRANSCRIPT IS A
ROUGH DRAFT
OF THE DECISION OF
6/16/06

12 PLACE: Atlantic County Courthouse
13 1201 Bacharach Blvd.
14 Atlantic City, New Jersey
DATE: June 16, 2006

15 BEFORE:

16 HONORABLE WILLIAM C. TODD, III; P.J.Ch.

17 TRANSCRIPT ORDERED BY:

18 CAPEHART & SCATCHARD

19 APPEARANCES:

20 JON C. MARTIN, DEPUTY ATTORNEY GENERAL
21 CHRISTOPHER D. BALL, DEPUTY ATTORNEY GENERAL
(OFFICE OF THE ATTORNEY GENERAL)
22 Attorneys for the State

23 JOHN K. FIORILLA, ESQUIRE
(CAPEHART & SCATCHARD)
24 Attorney for J.P. Rail

25 FRANK G. OLIVO, ESQUIRE
(F.G. OLIVO, P.C.)
Attorney for Magic Disposal

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ADELE TALASNIK, C.S.R.
OFFICIAL COURT REPORTER
ATLANTIC COUNTY COURTHOUSE
1201 BACHARACH BOULEVARD
ATLANTIC CITY, NEW JERSEY 08401

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Colloquy

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1 THE COURT: The matter that we're going to be
2 dealing with now is captioned State of New Jersey v.
3 J.P. Rail and others. The docket is C-41-06.

4 Could I have your appearances? We can start
Page 2

5 with the attorney general.

6 MR. MARTIN: Good morning, your Honor, my
7 name is John Martin. I'm a deputy attorney general
8 representing the State of New Jersey.

9 MR. BALL: Christopher Ball, Deputy Attorney
10 General also with the State.

11 MR. FIORILLA: John Fiorilla, Capehart &
12 Scatchard for J.P. Rail Inc. and SRNJ Logistics.

13 MR. OLIVO: Frank Olivo representing the
14 defendant Magic Disposal, Incorporated.

15 THE COURT: This is the return date of an
16 order to show cause, the focus of which is a request
17 for injunctive relief. The matter involves some
18 substantial and complex issues that are going to
19 require some extended discussion. As is my general
20 practice on motion, what I intend to do is to spend a
21 fairly substantial amount of time outlining my
22 perspective on the dispute before I hear from you. At
23 which point I'll be glad to hear from you. My sense is
24 that that will be helpful, at least to me, and probably
25 to you in terms of framing the discussion that we're

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Colloquy

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1 going to have. It's possible that I will also adopt
2 the analysis that I'm about to outline in terms of
3 framing whatever decision I ultimately make and I think
4 there's a reasonable chance that I will decide this
5 matter from the bench this morning. By this matter I
6 mean the request for preliminary injunction. But it's
7 also conceivable that I'll be -- that I'll ultimately

8 conclude that I should reserve decision for a short
9 period of time. I doubt that I'll write an opinion. I
10 tend to think I'll resolve the matter today but that's
11 going to depend on part on how you respond to my
12 perspective and I'll note my perspective may be
13 different than that of each of the various parties but
14 in any event, let me in that context spend some time
15 outlining what I see as the most basic dispute that I
16 have to resolve and the issues that I think, the
17 particular focused issue that I think you need to
18 address in any argument. And again I'm doing this
19 contemplating that these comments may well form the
20 basis for whatever decision I make which may well be
21 subject to appellate court review depending on the
22 circumstances. The plaintiff Department of
23 Environmental Protection has requested the issuance of
24 an injunction against the construction and operation of
25 a facility located at 16 North Franklin Boulevard in

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Colloquy

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1 Pleasantville. I understand that the construction
2 aspect of that is not, is not as substantial an issue
3 as the operation which because the facility is actually
4 operating and has been operating for some time. The
5 dispute involves a rail carrier and other entities
6 which are involved in the handling of solid waste.
7 This is the return date of an order to show cause.
8 From my perspective, the focus of the argument and any
9 decision I make is on one simple question and that is,
10 is the facility or the operation in question subject to

11 regulation by the State, specifically under the Solid
12 Waste Management Act which is at New Jersey statutes
13 13:1E-1 and CAFRA which is a separate statutory scheme.
14 There's no question that the activity that in my mind
15 there's no question that the activity that is taking
16 place on the site would be subject to regulation by the
17 State under those two statutes but for the involvement
18 of the rail carrier, the most basic defense, if you
19 will, to that type of regulation is a claim of
20 preemption, specifically, that regulations preempted by
21 the Interstate Commerce Commission Termination Act
22 which is at 49 U.S.C. 10501. The preemption section
23 being subsection B of that statute which in essence
24 provides that the Surface Transportation Board has
25 exclusive jurisdiction over transportation by rail

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Colloquy

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1 carriers and the construction and operation of tracks
2 and facilities. So, the basic issue is whether
3 preemption applies here, I think that's fairly obvious.
4 I conceive that that is a legal issue at base. There
5 are some factual overlays here that are fairly complex.
6 The basic circumstances, I think, are clear, but there
7 are a number of factual disputes presented in the
8 materials that have been submitted that may or may not
9 be relevant to the question of preemption. I note, I
10 conceive that there are a variety of ways that one
11 could resolve the preemption issue. There could be
12 total preemption which I understand is the position
13 that is essentially articulated by the defendant, there

14 could be no preemption which may be the position, no
15 preemption at all which may be the State's position,
16 I'm not clear we're going to have to clarify that, or
17 it may be that there's some partial preemption and the
18 cases certainly speak of the distinction between
19 preemption of permitting and preemption of regulation
20 more generally and in this case, there are issues
21 raised with respect to what are called the 2D
22 regulations under the Solid Waste Management Act which
23 I believe are reflected in New Jersey Administrative
24 Code section 7:26-2D.1 I want to frame what I think
25 is the most fundamental question presented, very

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Colloquy

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1 specifically, and it's this, does the I.C.C.T.A.
2 preempt the regulation of the handling or processing of
3 solid waste by the State. Now, that is obviously an
4 issue of congressional intent. Did congress intend
5 that preemption as a part of preemption provisions of
6 the statute in question? Our law has developed a
7 variety of rules or standards one can refer to in
8 trying to resolve preemption issues. There are
9 distinctions between express preemption, field
10 preemption, conflict preemption. Another way of
11 stating that general prospect is one can say whether
12 there's explicit preemption or preemption that's
13 implicit in the structure and purpose of the statute.
14 One can refer to the matter by asking whether state law
15 actually conflicts with federal law. One can resolve
16 the matter by questioning whether the federal law

17 occupies a field so thoroughly that there can be no
18 regulation. But in the end, it's really a question of
19 congressional intent and that is obviously a tricky
20 issue as often the case in terms of dealing with
21 legislative intent. I do think that it is helpful and
22 I think in the end appropriate to focus the inquiry on
23 the most general question, which is should one conclude
24 that the I.C.C.T.A. was not intending to preempt state
25 regulation of the processing and handling of solid

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Colloquy

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1 waste. If the answer is yes, it wasn't intended to
2 preempt that, the plaintiff is from my perspective
3 probably entitled to a restraint today. I'll get to
4 the specifics in a second. If no, then the opposite
5 result would pertain. Let me tell you about a few
6 things that I don't think deserve a great deal of
7 discussion today. One is the CAFRA issue. I don't
8 really think that we need to focus a great deal on
9 CAFRA because at least on the face of things it seems
10 to me the law supports the general proposition that
11 there would be preemption of statutes like CAFRA. I
12 think and I'll acknowledge, I may be wrong, that the
13 more focused issue here doesn't have to do with
14 environmental regulation generally or the regulation of
15 particular areas of the landscape, it has to do with
16 the regulation of activities, particularly the
17 processing of solid waste. So I'm not convinced and
18 this is again partially a legal issue that I should
19 resolve the dispute that's presented here either on a

20 permanent basis or on a preliminary basis in favor of
21 the state by concluding that there's no preemption of
22 CAFRA, and I don't intend to spend a lot of time
23 discussing that. I don't -- I'm not expecting anyone
24 to concede the issue, but from my perspective today
25 it's not something that we need to spend a great deal

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Colloquy

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1 of time discussing. There are also two very distinct
2 factual disputes that I'm convinced I cannot resolve
3 today that would require for their proper resolution at
4 least a hearing and probably some discovery which is to
5 say that at least at this point, the plaintiff has not
6 established a probability of success with respect to
7 those specific issues. First, there's the question of
8 who or what entity is actually operating the facility
9 in question, or as I might phrase it differently, who
10 is the entity that is engaged in the processing of
11 solid waste that would be subject to regulation under
12 the Solid Waste Management Act. Is it as I think the
13 State would urge, Magic, that is, someone who's
14 historically been involved in the processing of solid
15 waste, or is it as the defendants would suggest, the
16 rail carrier or its agents and part of that relates to
17 Mr. DeClement's interest in the matter, having
18 previously appeared as an attorney for Magic and now
19 apparently being either an employee or someone with an
20 ownership interest in one of the other entities that's
21 involved in this operation. I don't think I'm
22 absolutely convinced I can resolve those issues now.

23 It seems to me quite clear if they become important and
24 they may not be, if they become important, they
25 probably are the subject of discovery, substantial and

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Colloquy

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1 interesting discovery that would involve substantial
2 amount of disclosure, but I don't think I can resolve
3 those issues today. The second issue that I'll call
4 factually based although there's a bit of a legal
5 overlay to it is the whole question of whether or not
6 the operation as it is currently in place is in
7 violation of the 2D regulations and/or CAFRA for that
8 matter. There are substantial submissions about that
9 and I suppose if I thought it was appropriate, I could
10 spend a fairly substantial amount of time focusing on
11 each particular item that's at issue, things like what
12 has to be paid and the like. Those things can also, I
13 don't know that they really require discovery. They
14 may require some more of a hearing. I'm just not in
15 the position, I don't think, to resolve those issues
16 today and I don't think given the time limit we're
17 dealing with today that it's going to be productive to
18 discuss them. It may be that those issues could be the
19 subject of some other type of a hearing that probably
20 wouldn't require discovery and may not require extended
21 testimony, but I'm not in a position to resolve those
22 based on the papers that I have today. But I think the
23 real issue that's presented here is the question of
24 whether the plaintiff's request for restraint is
25 dependent on the resolution of those issues and I'm not

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Colloquy

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1 convinced that it is. That's the essential legal issue
2 that I want to focus on. And let me just explain that
3 briefly. There's no question in my mind, I don't think
4 this is a factual dispute, that what occurs on this
5 site involves the processing of solid waste, that but
6 for the preemption issue would be subject to regulation
7 by the State, including permitting. If there is no
8 preemption and I mean absolutely no preemption, let me
9 use that general term, if there's no preemption, a
10 permit from DEP would be required. There's no permit
11 that's been issued and there would I think clearly be a
12 right to a restraint, and we can discuss in some detail
13 the requirement that one has to meet when one wants to
14 establish a right to preliminary injunction, although
15 that's again secondary to what I think is the I think
16 is the basic legal issue but let me focus on that for a
17 second. Assuming that I were to conclude there were no
18 preemption, that the activity that would occur on the
19 site are subject to regulation by DEP under the Solid
20 Waste Management Act, and I also conclude what is
21 obvious, that is, there hasn't been any permitting of
22 that, I'm satisfied that on its face is a sufficient
23 showing of what the cases referred to as irreparable
24 harm, not because I would conclude that there's some
25 dramatic violation of a particular statute, but because

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1 there's a failure to obtain a permit when that would be
2 required under the law. Again, that presumption that
3 there's no preemption. And because it is the
4 government who is here asking essentially to enforce
5 the law I'm satisfied that's sufficient in the most
6 general sense to establish the type of irreparable harm
7 that would justify the issuance of a preliminary
8 injunction. Why? Because all I'd be doing, asked to
9 do is to confirm that people have to comply with the
10 law and if I don't do that, it invites violations, not
11 just by this defendant or defendants but by other
12 people, so and I don't think that requires a great deal
13 of discussion. By the same token, if I were to
14 conclude that there is preemption, so that permitting
15 is not required, I'm not satisfied that the state today
16 could establish the type of irreparable harm that would
17 justify issuing a preliminary injunction. That would
18 depend on my finding perhaps only partial preemption
19 and finding that the two regulations apply and finding
20 that there was a violation of them and that there was
21 some irreparable harm flowing from the failure to
22 comply and I'm just not ready to reach those
23 conclusions on the paper record that I have today and
24 as an aside, I think that raises a very interesting
25 problem, that scenario that I'm talking about is

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Colloquy

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1 partial preemption resolution of this case, which means
2 that you can't require a permit but you can enforce the

3 regulations. It seems to me that that begs the
4 question of how one enforces the regulations which
5 calls into play cases like Ridgefield Park, a New
6 Jersey Supreme Court court opinion 163 New Jersey 446
7 where the Supreme Court fashioned some fairly unusual
8 mechanisms for dealing with the problem where it found
9 there was what I'll call partial preemption permitted
10 some regulation if not permitting where it said, well,
11 the town or the village in question could have access
12 to the facility, but the railroad would have to notify
13 the facility of the activity but wasn't required to
14 obtain a permit. There were specific discussions about
15 how you approach site plan problems, how one approaches
16 conflicts over fire, health and safety regulation,
17 there's a specific reference in that case to
18 applications being made with the Law Division for
19 enforcement which is a different kind of dynamic than
20 what we have here which suggests that it might be
21 appropriate to focus one on the question of whether
22 there should be a restraint because of a violation of
23 permitting on the one hand that arguably would be a
24 classic Chancery type of case, or some type of
25 enforcement mechanism that presumably could be in the

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Colloquy

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1 Law Division and structured in a different way and I
2 don't know that the law is very clear about that but
3 the point at this point is simply that I'm not
4 convinced I should issue preliminary restraint if what
5 we're talking about is partial preemption involving

6 enforcement of the 2D regulations because I'm not
7 convinced there's a dramatic showing of the violation
8 of the 2D regulations themselves. So let me return to
9 what I think is the basic issue which I'll probably say
10 a dozen more times, does ICCTA preempt state regulation
11 of the processing of solid waste specifically
12 permitting? Those issues that or that issue which
13 again relates to congressional intent clearly can be
14 addressed in a variety of different ways. Clearly
15 courts can resolve the issue. I may resolve the issue,
16 other courts have certainly been given an opportunity
17 to resolve the issue. I don't know that they have.
18 We're going to talk about that at some length. The
19 Surface Transportation Board has been presented with
20 the issue in one way or another. I'm not convinced
21 it's ever resolved it and clearly, Congress can address
22 the issue in one way or another if it wanted to. It's
23 not in a position to resolve questions of its own prior
24 intent but it could clearly deal with the issue by
25 additional legislation. One of the things that I think

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Colloquy

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1 is important to make clear in terms of how I look at
2 this is that I conceive that the legal issue that I
3 framed is something that I have to resolve, that I have
4 an obligation to resolve and I don't look at this as an
5 issue in its most basic sense that I should approach by
6 saying, well, I'm uncertain about this legal issue. I
7 mean, it is what it is. If it's not factually based,
8 there's a legal issue that has to be resolved and I

9 think on this application I'm required to resolve it.
10 My sense is that there are other courts who have been
11 faced with the same dynamic and they haven't at least
12 specifically resolved it, they may have indicated an
13 inclination one way or another but they haven't
14 specifically resolved it. I think as a part of the
15 analysis that I'm supposed to engage in today I'm
16 required to resolve that issue even though it's a
17 difficult issue and I can start by acknowledging that
18 question. I don't believe that the basic question that
19 I have outlined has clearly been resolved by any of the
20 existing case law. There are opinions which I find to
21 be in conflict on the issue. There are a variety of
22 judicial opinions that are problematic because of the
23 particular fact patterns in question but I'm still
24 presented with it. I want to discuss the case law that
25 I think is helpful in framing the issue and let me

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1 refer first to four specific opinions all of which have
2 been touched on in the briefs. There are others in the
3 briefs but these are the four that I found to be
4 helpful in terms of analyzing the situation. Judge
5 Simandle's opinion in J.P. Rail, 404 F. Supp. 2d, 636
6 involves the same parties here and the State would
7 argue the same type of operation. The Second Circuit
8 opinion in Green Mountain which is 404 F.3d 638, the
9 Third Circuit opinion in Hi Tech which is 382 F.3d
10 295. And a district -- a Federal District Court
11 opinion from Michigan, Canadian National decided about

12 a year ago I believe which I don't think is a published
13 opinion. And then there are additional issues raised
14 that we're going to have to discuss that relate to the
15 provisions of the New Jersey Administrative Code.
16 Before I talk about those four opinions and the New
17 Jersey Administrative Code, let me note three things
18 that I don't think are particularly helpful in terms of
19 addressing the basic question I've tried to frame.
20 First, there are the orders that I've been given in a
21 case being handled by Judge Hayden (phonetic), the New
22 York Susquehanna case I don't have the cite in front of
23 me it's not a published opinion where there are
24 restraints against enforcement of 2D regulations. I
25 understand that but that's not helpful to me in terms

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Colloquy

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1 of reaching an ultimate conclusion with respect to the
2 basic legal issue. I think it's quite clear under the
3 terms of at least the most recent order that I saw in
4 that case that Judge Hayden is still considering this
5 whole question of preemption so she -- if she's
6 resolved it, she hasn't resolved it in a form that's
7 been communicated to me. Second, there is a submission
8 that I received just a day or two ago, June 13, 2006
9 decision of the Surface Transportation Board that
10 doesn't help, it just indicates that the Surface
11 Transportation Board has reached the issue but not
12 resolved it. Third, there's what I'll call the unusual
13 submission I received from the State with respect to
14 comments in a report of the appropriations committee

15 referring to what it called a purported loophole in the
16 statute urging the Surface Transportation Board to
17 resolve the issue, that's not helpful either, it just
18 begs the question of you got a bunch of congressmen
19 that think this issue is so clear why don't they pass a
20 statute that closes the loophole that they referred to
21 if it's really a loophole that suggests that there is
22 preemption. So I didn't find any of those things to be
23 particularly helpful so let me get to the cases. How
24 could they relate to the question I would like to focus
25 on which is again does the ICCTA preempt state

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Colloquy

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1 regulation of the processing of solid waste. Let's
2 start with Judge Simandle's decision in J.P. Rail. I
3 think it is clearly support for the plaintiff's
4 position. You have the same parties. It appears from
5 what I have before me that you have the same basic
6 operation, same type of operation. There are
7 distinctions, first procedurally, the plaintiff in this
8 case was the railroad, the plaintiff in this case was
9 the State. There's a different focus in terms of the
10 statutes in question. Judge Simandle's opinion appears
11 to focus largely on the Pinelands regulations. And
12 it's clearly a different issue with respect to the
13 roles of the parties. Here we have a situation where
14 the rail carrier is the owner of the property. You
15 have a different situation there. Judge Simandle
16 concluded there was no preemption in that case and he
17 did that by focusing on the distinction between

18 transportation by rail and transportation to rail, a
19 distinction that arose at least in part by the Hi Tech
20 decision that I'll come back to. I thought the
21 analysis was generally appropriate but it also raises a
22 number of problems. In essence, it focuses that the
23 nature of his analysis focuses on that phrase by rail
24 as I take it to assist in trying to determine what the
25 congressional intent was with respect to the issue but

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Colloquy

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1 it begs the question of that's raised at least
2 partially in this case, does it matter whether the
3 railroad owns the entire facility. Does that change
4 the dynamic of what's occurring? Or are those just
5 semantics. To put it otherwise, I'll come back to this
6 in a number of different ways, I think there's a clear
7 distinction between saying I'm going to resolve the
8 issue of congressional intent by focusing on the
9 language of the statute that refers to transportation
10 by rail instead of focusing on the issue that I'm
11 concerned about which is because there's a slightly
12 different scenario, focusing on the particular activity
13 that's in question, the processing of solid waste. You
14 can approach it either way but when you do as Judge
15 Simandle did, focus on that language by rail, it raises
16 a number of other perspectives that can become
17 problematic. My thought process is that the most
18 direct way to deal with this issue is to focus on the
19 process or the activity not necessarily the question of
20 whether it is transportation to rail or by rail. I'm

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21 not sure that that is a helpful way of analyzing the
22 matter. It may be more confusing and this case
23 suggests that but having said that, the analysis itself
24 strikes me as a relatively reasonable way of
25 approaching the issue. And clearly, clearly, from my

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Colloquy

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1 perspective, that analysis supports the position being
2 advanced by the plaintiff here. So what about Hi Tech?
3 That was the source of at least appears to be the
4 source of Judge Simandle's distinction that found its
5 way into the J.P. Rail decision about transportation by
6 rail or to rail. Hi Tech involved a situation where
7 again there was as I recall it a solid waste component
8 to the problem. The lower court had abstained, didn't
9 deal with the preemption issue. The circuit court
10 found there was a specific need to deal with the issue
11 and concluded there was no preemption and it affirmed
12 the trial court decision which essentially dismissed
13 the complaint that had been filed seeking a restraint
14 against the regulation in question and again it used
15 that distinction transportation to rail and by rail.
16 One could suggest that that analysis is also
17 problematic just as I've suggested the J.P. Rail
18 decision was problematic because in Hi Tech, the
19 plaintiff was not a rail carrier, it was operating
20 under a license agreement which is another way of
21 suggesting that there are problems presented when one
22 begins to structure one's analysis about identifying
23 the land owner and the operator rather than focusing on

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24 the activity itself. Having said all that again just
25 as with J.P. Rail, Hi Tech appears to support the

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Colloquy

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1 plaintiff's position in this particular matter. And
2 comes close to answering the question that I have
3 posed, that is, to suggest that the federal statute
4 doesn't preempt regulation of the processing of solid
5 waste. But there are other cases that are problematic.
6 There's the second court opinion, second circuit
7 opinion in Green Mountain. What was at issue there was
8 Vermont environmental regulations which were being
9 applied to a transloading facility. The circuit court
10 found there was preemption. And there were specific
11 conclusions outlined in that opinion indicating that
12 the federal statute did give the surface transportation
13 authority authority over transloading and that was in
14 the form of permitting and that court said that the
15 preemption issue was clear, so there's dramatic support
16 in the language of that opinion for the position taken
17 by the defendant with respect to the question of
18 preemption but Green Mountain doesn't really address
19 the issue that I have posed which is framed not in
20 terms of preemption generally but in terms of
21 preemption of the specific activity that's at issue
22 here, the processing of solid waste. Why, because
23 while Green Mountain found preemption with respect to
24 transloading, the facility that's in question there did
25 not at least as I understand it involve the processing

Colloquy

1 of solid waste. That was a facility that was
2 offloading materials from a train and the materials
3 that were being offloaded were salt and concrete, they
4 weren't solid waste, so Green Mountain is helpful if
5 all you want to do is say, well, there's going to be
6 some preemption with respect to the activity of
7 transloading but I don't know that it's helpful with
8 respect to the question of whether there's preemption
9 with respect to the processing of regulation of the
10 processing of solid waste. That gets me to the fourth
11 opinion, the unpublished district court opinion in
12 Canadian National. Now that obviously involves a
13 slightly different statutory scheme, same federal
14 statutory scheme that's at issue but there you're
15 dealing with Michigan regulations that extended to
16 zoning, permitting and other regulations generally.
17 There's specific reference in the opinion to a solid
18 waste ordinance but it's a county ordinance not a state
19 ordinance. It did obviously involve a transloading
20 facility. It did involve construction and demolition
21 debris, but again, it's distinct from the case
22 presented here in that it involved offloading as
23 opposed to onloading and I'm not sure that it's clear
24 from that opinion that it involved the processing of
25 solid waste in the sense that I'm using it and in the

Colloquy

1 sense that I think is raised here which is it's not
Page 20

2 just a question of somehow solid waste being put on a
3 railroad car, it's a question of solid waste being
4 exposed to the environment generally being processed in
5 some way. Canadian National offers a very interesting
6 perspective. One could say Canadian National
7 represents what hypothetically is the other end of the
8 transaction that begins here where solid waste is
9 processed, put on a railroad car, taken to another
10 state. Well Canadian National is the other end of that
11 process where it gets there and it's taken off the
12 railroad to be disposed of somewhere and I suppose all
13 that begs the question of what's involved in processing
14 solid waste. Hypothetically, one can imagine a
15 situation where solid waste is gathered, somewhere
16 gathered, put into a sealed container somewhere and
17 then is somehow taken to a railroad to be loaded on the
18 railroad, taken somewhere else and unloaded. And if
19 one starts one's analysis at the point where the solid
20 waste has been put into a sealed container so it's not
21 going to be processed in any other way, it seems to me
22 it changes the analysis dramatically. That's not the
23 case that I have here and my sense is that in terms of
24 the question I've posed, is there preemption of
25 regulation of the processing of solid waste, I need to

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Colloquy

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1 acknowledge that that you don't have to get to that
2 question if all that's happening is that sealed
3 containers are being put on railroad cars, sealed
4 containers are being taken off railroad cars and

5 there's no processing that's taking place at the
6 facility in question which is another way of saying I'm
7 not sure if there's any processing taking place in the
8 Canadian National facility where the offloading was
9 occurring. One would think there wasn't but I suppose
10 I can't be clear. Clearly, the Canadian National
11 opinion offers support for the position taken by the
12 defendant here in the sense that it clearly recognizes
13 a transloading is transportation and that there is
14 preemption that applies to transloading. There are
15 other distinctions in terms of the roles of the parties
16 involved, shipper carriers versus contractors that I
17 don't think require a great deal of discussion. That's
18 as much of the case law that I think I need to discuss
19 in terms of framing the issue and the most basic point
20 I wanted to make is I've considered those cases, I've
21 considered the other case and I don't think any of them
22 clearly resolve the specific legal issue that I think
23 is most dramatically presented here which I already
24 repeated a number of times. There are cases that
25 support the plaintiff's position that there's no

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Colloquy

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1 preemption, there are cases that support the
2 defendant's position that there's no preemption but
3 none of them address directly the focused issue that
4 I'm concerned with. They're for various reasons
5 factually distinguishable because of regulations, the
6 roles of parties and the like. So where does that put
7 us? Well, I suppose one could say it doesn't get us

8 very far in the analysis and in simple terms I can come
9 back to a very fundamental simple question. I have a
10 statute. I need to decide whether Congress intended
11 whether there would be preemption of the particular
12 activity that's at issue here. I have a group of cases
13 that sort of touch on the issue and provide some
14 support one way or the other but none that deal with
15 the issue as directly as I think it can be dealt with
16 and ultimately must be dealt with. I think there are
17 fair -- there's a fairly appealing analysis or
18 perspective on it which is framed this way. The
19 processing of solid waste is a sensitive, dramatic
20 problem, classically subjected to regulation at the
21 local level, and it is difficult to imagine that
22 Congress would have intended that either the regulation
23 of those activities by the states would be preempted by
24 the statute, or that it would, or that it intended to
25 entrust the resolution of those regulatory problems to

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Colloquy

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1 the Surface Transportation Board. I think there's some
2 basic intellectual appeal to saying that can't be what
3 they intended, it's counter-intuitive. It doesn't seem
4 to fit with what one would think Congress was concerned
5 about when it was trying to protect rail carriers from
6 undue intrusion. You can frame that in a number of
7 different ways in terms of different ways of
8 approaching preemption, conflict preemptions and field
9 preemption and the like but that's a fairly appealing
10 argument from my perspective which would support the

11 plaintiff's claim that I should conclude that there's
12 no permitting preemption under ICCTA at least with
13 respect to the Solid Waste Management Act. But it's
14 not an issue that's clearly resolved in the case law.
15 Now that gets me to another issue that concerns me
16 that's independent of the case law and it relates to
17 the New Jersey Administrative Code and in particular to
18 a comment that appears in the submissions from the
19 defendant, in particular, Mr. DeClement's certification
20 that refers back to some other materials which only
21 became clear to me yesterday which resulted in my
22 soliciting some other submissions which I assume
23 everybody was given yesterday but let me put it in
24 context. In the brief that in one of the briefs that
25 was filed and clearly in Mr. DeClement's certification,

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Colloquy

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1 there was a reference to what he called the preface to
2 the regulations offered as suggesting a type of
3 preemption. That wasn't clear to me what was meant by
4 preface and I asked my law clerk to contact one or
5 another of the parties to try to clarify that and
6 ultimately I was given yesterday a document. I have
7 here what I believe is the current version of the New
8 Jersey Administrative Code and I've referred to and
9 I'll come back to that in a second because it raises
10 another issue that's similar to this but what I was
11 given yesterday is something a bit different. It is
12 the New Jersey Register and in particular appears to be
13 copies of Volume 36, Number 22, November 15, 2004, The

14 Journal of State Agency Rulemaking which, as I
15 interpret it, refers to some proposed amendments to
16 N.J.A.C. 7:26-4.1. Now, there are other sections of
17 7:26 that are subject to that, but at least 4.1 is and
18 I'll say right now I don't have any sense at all
19 whether the amendments were adopted or not, whether
20 they're in the current form or not, that's not the
21 point. The point is there's somewhat I'll call
22 prefatory material provided that I take it comes from
23 the Department of Environmental Protection talking
24 about these proposed amendments to the Administrative
25 Code and those amendments appear to suggest that the

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Colloquy

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1 department acknowledged that there was preemption and
2 we need to discuss that at some point. I'll just quote
3 briefly from the summary portion that I have before me
4 so the record is clear with respect to my perspective
5 on this and again this is not a regulation, this is a
6 summary that accompanies apparently a proposed
7 amendment. There is a specific reference at one point
8 to the Interstate Commerce Commission Termination Act
9 in 1995, describes it generally, and now let me quote.
10 "Accordingly, the Act preempts State and local
11 regulation over rail carrier construction and
12 operations, but does not preempt the State's important
13 role in enforcing Federal, State and local
14 environmental laws and regulations." It goes on to
15 talk about proposed amendment and then says, "Pursuant
16 to the proposal, rail carriers that transfer

17 containerized or non-containerized solid waste to or
18 from rail cars are exempt from the requirements of
19 Subchapter 2, governing the disposal," it says, "or
20 non-hazardous solid waste, but are required to comply
21 with the requirements of new Subchapter 2D, governing
22 management of solid waste at rail carrier facilities."
23 Continue with the quote. "The proposal also exempts
24 rail carriers who engage in the transportation of solid
25 waste in the State from the requirement at N.J.A.C.

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Colloquy

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1 7:26-3.2(b) of submitting a disclosure statement
2 described" in another reference to the Administrative
3 Code, "section with an application for approval of a
4 registration statement. Finally, the proposal exempts
5 rail carriers that transfer solid waste to or from rail
6 cars from the regulations that govern the authorization
7 and operation of intermodal container facilities at..."
8 another recitation to another section of the
9 Administrative Code.

10 Moving further down, just one more quote
11 although there are others. "Lastly, through this
12 proposal..." and I think it's a reference to another
13 amendment, "the Department is clarifying that rail
14 carriers are not subject to the specific additional
15 design and construction requirements for solid waste
16 transfer stations found in Subchapter 2B, by proposing
17 an exemption from these requirements at..." And cites
18 another rail section. "Since rail carriers must comply
19 with the applicable requirements of N.J.A.C. 7:26-2D,

20 it would be duplicative for them to comply with the
21 requirements of Subchapter 2B." Well, one can
22 certainly read all of that as suggesting the Department
23 of Environmental Protection has at least taken the
24 position in proposing those regulations that there is
25 some preemption and I don't know of any way to

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Colloquy

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1 interpret that other than saying some preemption means
2 preemption of permitting, but maybe you can do some
3 other regulation and as I've indicated at the very
4 beginning of the comments I made here, I'm not
5 convinced that I should issue a preliminary restraint
6 if all that's at issue is the ability to regulate under
7 2D as opposed to permitting, so the State is going to
8 have to explain that and I'll come back to that in a
9 second. The current administrative regulations at
10 7:26-2D.1 subsection (b), contains some very specific
11 provisions that also seem to imply unless I'm missing
12 something an absence of permitting authority. There is
13 a subsection (b) I might as well read it, "A rail
14 carrier that transfers containerized or
15 non-containerized solid waste to or from rail cars
16 shall provide the Division of Solid and Hazardous Waste
17 with the following information prior to commencing
18 solid waste transportation operations within the State
19 of New Jersey." And then it lists some things. That
20 seems to me to imply that you don't have to get a
21 permit. You have to provide information. Subsection
22 (c) deals with a slightly different situation. "A rail

23 carrier that engages in the transportation of solid
24 waste at a facility owned by such rail carrier within
25 the State of New Jersey exclusively in the form of

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Colloquy

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1 sealed containers of solid waste, and that does not
2 engage in any form of solid waste tipping such as onto
3 the floor of a building or other structure, processing,
4 sorting or compaction, or the removal of solid waste
5 from a container to transfer to another container or
6 vehicle, shall comply with the following requirements."
7 And then it imposes some requirements again in the
8 context of some subsection (b). One could interpret
9 that as suggesting we know we can't get a permit, but
10 here's the way we're going to regulate, all of which is
11 to say that I think the basic question that's presented
12 is should one interpret the I.C.C.T.A. as preempting
13 state regulation of the processing of solid waste, that
14 it seems to me one can make an appealing argument based
15 on the basic circumstances, the logic presented when
16 one focuses on what congressmen would have been
17 considering when they consider the legislation. On the
18 other side, one has these administrative regulations
19 that appear to be -- to take the other position, that
20 is, that there would in fact be some preemption which
21 appears to be acknowledged by the stay itself. And
22 with all of that, I have some case law that one could
23 use I think to get to either result. Now I'll
24 acknowledge that maybe the proper result is not total
25 preemption or no preemption at all, but if that's what

Colloquy

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1 the result is, the State shouldn't expect restraint to
2 be issued today. And now I'll be glad to hear from you
3 and I suppose we should start with the State. It
4 doesn't really much matter to me.

5 (Colloquy)

6 THE COURT: Okay. Thank you. At the
7 beginning of this proceeding, I spent a substantial
8 amount of time outlining my initial perspective on the
9 dispute that's before me today which is essentially the
10 plaintiff's request that a preliminary injunction issue
11 restraining the operations at the facility in question.
12 During those comments, I outlined my perspective on
13 the factual disputes that are raised, I outlined my
14 view of the legal issues presented, including my
15 analysis of the existing case law that bears on the
16 application, and I framed the issue in a very specific
17 way, indicating that the initial question that I
18 thought I needed to resolve was simply phrased in the
19 following way, does the Interstate Commerce Commission
20 Termination Act act prevent state regulation of the
21 processing of solid waste. I'm going to incorporate
22 here all the comments that I made earlier in this
23 proceeding, rather than repeating them, and I note it
24 would be essential for anyone reviewing my
25 determination today to understand those comments and to

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1 have considered them, but I don't see any reason to
2 repeat them again, it took me a fairly long time just
3 to place those comments on the record. And I
4 acknowledge in those comments that the law was unclear
5 with respect to that basic issue, that a variety of
6 arguments could be made for or against the proposition
7 that there was preemption based on existing case law
8 and based on a reference to the provisions of the New
9 Jersey Administrative Code. I am satisfied that the
10 basic issue presented is a legal one, and as I noted
11 before, that I have the obligation of resolving that
12 issue as a part of whatever analysis I engage in today.
13 I recognize that it would be appropriate if I did have
14 a determination from the Surface Transportation Board
15 with respect to these issues for me to consider its
16 determination. I recognize that clearly the power now
17 if I wanted to defer a decision until I have something
18 from the Surface Transportation Board and by power
19 meaning I could do it if I wanted to whether it's
20 appropriate or not. I'm not convinced it's appropriate
21 for me to defer my decision until there's action taken
22 by the Surface Transportation Board. In fact, my
23 conclusion is the opposite. To the extent I am asked
24 to resolve the issue, I think I have an obligation to
25 resolve it fairly and I'll simply indicate in very

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Colloquy

34

1 basic terms that my conclusion today is that the
2 Interstate Commerce Commission Termination Act does not

3 preempt state regulation of the processing of solid
4 waste . As I outlined in my earlier comment, it seems
5 to me that from that proposition flows the conclusion
6 that the plaintiff is entitled to the restraint that's
7 being sought here, and I intend to provide for that
8 restraint, although the timing of that restraint is
9 something we have to discuss. Any analysis of a
10 request for a preliminary injunction requires that one
11 consider existing case law such as Crowe v. DiGioia,
12 and the issues raised in that opinion and related
13 opinions were addressed at least in a preliminary
14 fashion in my initial comments and also in the
15 argument, but I think it appropriate that I touch on
16 them again. It is correct to note that under Crowe, a
17 preliminary injunction generally is not issued unless
18 it's necessary to prevent irreparable harm. I'm
19 satisfied the injunction that's sought here can be
20 issued consistent with that requirement, not because
21 I'm convinced that the operations that are ongoing at
22 this property create any immediate threat of physical
23 harm, but because I am satisfied that when the
24 application is made by the government, then the
25 government is simply seeking to enforce a rule of law

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Colloquy

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1 that the requirement of irreparable harm is satisfied
2 simply in those circumstances and as I think I noted in
3 my earlier comment, I don't think that really should be
4 subject to a substantial amount of debate. If one
5 concludes as I have now that regulation by the State is

6 not preempted and that therefore the operations in
7 question or some portion of them require permitting
8 before they can proceed, and if one accepts what is
9 obvious that the operations are ongoing without
10 permitting, it seems just obvious that there's
11 substantial harm if not in terms of physical risks to
12 the way in which our legal system functions. Permits
13 are required. A permit should be obtained before the
14 operation takes place, and I'm satisfied that in that
15 context, the issue of irreparable harm is satisfied,
16 albeit, that same analysis would support the conclusion
17 that I could defer for some time the implementation of
18 this order because I'm not concerned about immediate
19 physical risks. The second issue that's presented in
20 Crowe is the question of whether the law is unsettled.
21 The opinion in Crowe specifically refers to that in
22 this language, and I'll quote, A second principle is
23 the temporary relief should be withheld when the
24 underlying, excuse me, should be withheld when the
25 legal right underlying the plaintiff's claim is

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Colloquy

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1 unsettled. That's true. That's a proper statement of
2 the law, but I do think its application to these types
3 of circumstances is fairly limited. I do not believe
4 that that passage in Crowe is intended to deal simply
5 with the resolution of an issue of interpretation, a
6 pure issue of law. I am satisfied generally that
7 what's at issue in the case like Crowe are disputes
8 that are classically more a mixture of law and fact.

9 In any event, and I think you can make the point in the
10 same way that I was discussing the issue of irreparable
11 harm. The fact that there may be a dispute as to the
12 proper interpretation of the statute like the one I
13 have at issue can't possibly mean that you do not act
14 on the statute as it's enforced over the short-term or
15 the long-term. One could understand how one might
16 withhold action on this issue because the plaintiff's
17 claim was quote, unsettled, if it was contemplated that
18 when one -- let me back up. This analysis is obviously
19 based on applications for relief while litigation is
20 pending, and one can easily see how one might say well
21 I'm going to not issue an injunction because the law is
22 unsettled until we get to the end of the case because
23 at that point you know I'll have all the information I
24 need and it will be simply more appropriate to deal
25 with the matter with some finality. But the nature of

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Colloquy

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1 my analysis today is that the restraint that's being
2 requested here, let me back up, the restraint that I'm
3 anticipating issuing here isn't one that's subject to
4 being or the basis for that being issued today isn't
5 one that from my perspective is going to be subject to
6 being revisited absent some very unusual circumstances.
7 What could change my view of the basic legal principle.
8 Well, maybe the Surface Transportation Board will say
9 something and I'll decide I should have considered that
10 before I did this. That's possible. Maybe there'll be
11 some other court somewhere that has either more

12 authority than I do or more persuasive abilities than
13 the attorneys had and I'll read a decision and say yes,
14 I missed that, but I don't have any reason to think
15 that's going to happen. My sense is that I have
16 reacted to the legal issue and I've decided it as best
17 I can based on my understanding of the state of the law
18 and there's no reason for me to think that waiting for
19 discovery or a hearing is going to alter that. So I
20 don't think that it's appropriate to treat that
21 principle of Crowe as barring the relief that's at
22 issue here. The next point in Crowe is that you
23 shouldn't issue a preliminary injunction where material
24 facts are controverted. I recognize that but I think I
25 made it clear from my earlier comments while I see

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Colloquy

38

1 there are facts that are controverted they're not facts
2 that go to this issue and I don't think I need to
3 represent that analysis. And then there's the question
4 of relative hardship. I've considered the parties'
5 various circumstances. I do anticipate deferring for
6 some time and in my mind is it 30 days, is it 60 days,
7 some time the actual implementation of this. Clearly
8 for some short time, it would be appropriate to permit
9 adjustment. Frankly if the Surface Transportation
10 Board was going to decide the matter next week I don't
11 doubt I'd wait for that but I don't have that. But in
12 context, once I allow for some short term for
13 adjustment purposes, and considering the interest that
14 the State has in enforcing its laws if in fact it's

15 correct and I found it's correct, I'm satisfied that
16 there's no substantial hardship imposed on the
17 defendants that outweigh the interests of the state.
18 You can, you could spend some time I suppose analyzing
19 the question of which defendant am I concerned about.
20 I have a recollection that there was a reference in
21 some of the papers to the possibility of bankruptcy on
22 the part of the rail carrier, although that hasn't been
23 articulated in terms of the argument. Magic has the
24 ability to operate in another context. I've been told
25 today this rail carrier does other things at this

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Colloquy

39

1 facility which presumably it can do so I'm satisfied
2 that balancing the relative interests of the parties
3 the issuance of an injunction is appropriate. There
4 are a couple of issues that were raised in the argument
5 that I think I should comment on, primarily on some of
6 Mr. Fiorilla's argument. I understand the thrust of
7 his arguments about the limited size of the operation,
8 the efforts of the defendants and I'll refer to them
9 collectively to deal with their obligations in terms of
10 regulation and I don't have any reason to question in
11 terms of what I'm doing today that the defendants are
12 acting in good faith and are approaching the matter as
13 they thought was appropriate. I understand that Magic
14 has been involved in a lot of dramatic and volatile
15 disputes with other regulatory bodies but so be it.
16 Other than the fact that in one prior proceeding, I
17 concluded that it had failed to comply with a court

18 order which is what led me to require the one facility
19 to be closed, I've never had occasion to reach the
20 conclusion that Wazsen or Magic's a bad guy or a good
21 guy, so it's not a part of this dynamic at all, and I
22 assume for purposes of this that the defendants have
23 been acting entirely in good faith and that it's a
24 relatively small operation and that the real risks
25 imposed are fairly limited because of the way that it's

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Colloquy

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1 conducted itself but that's not the issue. The issue
2 is whether permitting is something that's required
3 because there's no preemption. I'm also concerned, and
4 I remain troubled in terms of the interpretive issue
5 that I had to deal with, with the passages in what were
6 referred to as the preamble to the Administrative Code,
7 the Administrative Code sections themselves, and the
8 comment that Mr. Fiorilla has attributed to
9 representatives of DEP, suggesting that the department
10 itself has taken positions in a variety of ways
11 suggesting that it recognizes its activities are
12 preempted. Well the bottom line is even if all of that
13 occurred, it doesn't matter to me because this is a
14 legal issue and if DEP interprets this differently than
15 I do, so be it. I don't have to accept their
16 interpretation. They're not taking the position that
17 has been suggested now, and even if they took it in the
18 past, it's not particularly helpful to me in terms of
19 my ultimate decision about how one should resolve this
20 legal issue and in the end it's rather interesting

~4968142

21 given all the discussion that we've had today that my
22 analysis basically comes back to some very simple, very
23 simple perspective on the dispute. It just doesn't
24 seem to make sense to me that Congress intended to
25 preempt the regulation of the handling of solid waste.

Colloquy

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1 It's a rather simple analysis, although it's framed by
2 a variety of general legal principles and then some
3 case law. I referred earlier to some of the principles
4 that have been developed in our case law with respect
5 to preemption and I don't need to repeat them, but I
6 will cite now one additional passage and this is from
7 the Ridgefield Park decision and I don't mean to
8 suggest that this is dispositive at all but it is
9 certainly a perspective on the issue of preemption that
10 one can bring to the matter if one wants to resolve the
11 matter by limiting preemption and this is at page 453
12 of the Ridgefield Park decision. I'm quoting from the
13 New Jersey Supreme Court which is in turn quoting from
14 it's own opinion, "Consistent with the nature of
15 federalism, we begin by noting that preemption is not
16 to be lightly presumed and that the historic policy
17 powers of the state are not to be superceded by federal
18 law unless that was the clear and manifest purpose of
19 Congress." I recognize that's one principle one can
20 bring to this analysis and find others that deal with
21 this issue from a slightly different perspective but in
22 the end, I'm not convinced Congress intended to preempt
23 the types of activity that are at issue here. So with

~4968142

24 all of that, I am satisfied that the plaintiff has in
25 fact established on a preliminary basis the right to an

Colloquy

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1 injunction but it's not an injunction against the
2 facility being operated in the most general sense, it's
3 an injunction against the handling of solid waste at
4 that facility. I suppose we could spend some time
5 discussing the specifics of how one frames that. I'm
6 not terribly concerned about that. I can imagine
7 structuring it by at least on an interim basis simply
8 saying the defendants are prohibited from bringing to
9 this location solid waste. It may well be. Just wait
10 until I'm finished Mr. Fiorilla. It may well be that
11 the defendant or one of them will find some way to
12 fashion some type of operation, some structure that
13 provides more guidance in terms of what can or can't
14 happen there and I'll allow time for that either to be
15 discussed today or on some other occasion. The timing
16 of the restraint is a different issue and again it's a
17 very interesting problem. I am convinced the State has
18 the right to this. I'm just as convinced that if I had
19 decided I wanted to do it, I could have said, well,
20 I'll wait until I hear from the Safety and
21 Transportation Board. I don't think that would have
22 been appropriate under the circumstances, but I
23 probably could have done that and I could have also
24 said, you know, you guys have me so confused I'm not
25 going to decide the matter today, I'll send you a

Colloquy

1 letter some day and you might have gotten that letter
2 in 30 or 60 days if I had approached it that way and,
3 quite frankly, I don't want to, I don't have any
4 particular desire because I don't think it compelling
5 on the facts to force the operation to cease but for
6 the fact that I think the State is entitled to that.
7 Before I come back to that time, let me make another
8 point and this is an interesting problem that you may
9 want to think about. In this case, there are a host of
10 issues that obviously can still be litigated and could
11 involve a substantial amount of time and effort: the
12 State's request for restrictions based on CAFRA, the
13 disputes raised with respect to the extent of
14 compliance with 2D regulations, the dispute raised with
15 respect to who's doing what, is it really a Magic
16 operation. Those are all issues that can easily be the
17 subject of ongoing litigation in this case. I haven't
18 resolved them yet. They are not. I didn't have to
19 resolve them today to issue a preliminary injunction
20 and I will note without committing myself to this that
21 if the State were to say to me today, by the way,
22 Judge, thanks for what you just did, forget about all
23 of those other issues, we don't care about them
24 anymore, you just said we can permit this place and
25 that's enough for us and therefore we don't want to

Colloquy

1 have to go through that whole process of arguing about
Page 39

2 CAFRA and taking discovery and having a hearing about
3 violation of 2D regulation and we don't want to have to
4 go through discovery with respect to who's doing what
5 in the operations. I'm certainly not going to do that
6 today. If the State asked me to do that, I suppose I
7 might think about it. What's interesting about that
8 dynamic of course is if that occurs and I said okay the
9 State's application is more limited, this is no longer
10 a preliminary injunction, this is a final injunction,
11 there's a final judgment and then everybody has the
12 right to appeal as opposed to current circumstances
13 which I will also recognize which is that Mr. Fiorilla
14 and Mr. Olivo certainly are free to challenge my
15 decision and they are free to attempt to challenge it
16 on an interlocutory basis if they thought it was
17 appropriate and I could easily imagine them saying well
18 we're going to file a motion for an interlocutory
19 appeal because we think you made a serious mistake,
20 Judge, and if you do that, we'd like you to stay this
21 application and, quite frankly, if they said they were
22 going to do that, and they did in fact file an
23 application for interlocutory appeal, it might not be
24 that hard to convince me that I should in fact stay the
25 implementation of the preliminary injunction at least

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Colloquy

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1 to the point where we see if the Appellate Division
2 takes the case. If they don't take it on an
3 interlocutory basis then I don't think I would consider
4 a stay but those are all a host of issues that we're

5 going to need to address in one way or another and in
6 addition at some point we have to talk about discovery
7 and the like. So I just raise all of those issues.
8 I'm prepared to enter an order. I'm prepared to defer
9 I'll tell you right now at least for 45 days the
10 implementation of the injunction and the question then
11 becomes what else do we need to discuss now and part of
12 that really involves people making decisions about what
13 they want to do and, quite frankly, I'm wondering if I
14 should just let you all think about it and talk to me
15 again maybe next week, but I'm going to listen to you.

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Colloquy

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FILED

JUN 22 2006

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THE STATE OF NEW JERSEY,
NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL
PROTECTION,

Plaintiff,

v.

J.P. RAIL, INC., a Pennsylvania
Corporation, d/b/a SOUTHERN
RAILROAD COMPANY OF NEW
JERSEY, and SOUTHERN RAILROAD
OF NEW JERSEY LOGISTICS, and
MAGIC DISPOSAL, INC.

Defendants.

SUPERIOR COURT OF NEW JERSEY -
ATLANTIC COUNTY

CHANCERY DIVISION

DOCKET NO: C-41-06

ORDER FOR PRELIMINARY
INJUNCTION

THIS MATTER having come before the Court upon the application for preliminary injunction of the Plaintiff, New Jersey Department of Environmental Protection, on notice to Defendants J.P. Rail, Inc., SRNJ Logistics, Inc. and Magic Disposal, Inc.; and the Court on June 16, 2006 having considered the submissions of the parties and heard the arguments of counsel; and the Court having determined as a matter of law that

the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501 et seq., does not preempt state regulation of the processing of solid waste, and having concluded that issue as a matter of first impression; and the Court further having concluded that there is substantial risk of irreparable injury to the public interest should the restraints not be entered and good cause having been shown; and the Court having issued a ruling from the bench on June 16, 2006:

IT IS on this 17th day of JUNE 2006, ORDERED THAT:

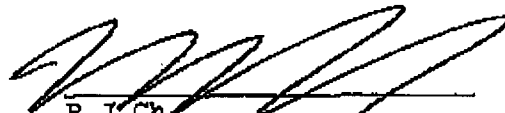
1. Defendants J.P.Rail, Inc., SRNJ Logistics, Inc. and Magic Disposal are enjoined until further order of the Court from the processing of solid waste at the Facility located at 16 N. Franklin Boulevard, Pleasantville City, New Jersey (the "Facility"), including but not limited to the disposal, sorting, processing, grinding, crushing, aggregating, segregating, and/or baling of solid waste prior to loading the waste into rail cars or containers for rail shipment; and

2. Upon a motion for leave to appeal filed by Defendants pursuant to R. 2:5-6, this Order shall be stayed, becoming effective again thirty (30) days after either of the following actions taking place:

A. Entry of an Order by the Appellate Division denying Defendants' motion for leave to appeal.

B. Entry of a Final Decision by the
Appellate Division upholding the
preliminary injunction against
Defendants;

3. Absent a motion for leave to appeal, the
provisions of this Order shall be effective forty-five (45) days
from the date of the entry of this Order at 5:00 p.m. on August
4, 2006.


P.J. Ch.

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